Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

EUGENE GABLE, HARVEY SPIES, JOHN FOLEY, and EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated,

Petitioners,

v.

SWEETHEART CUP COMPANY, INC., SWEETHEART HOLDINGS INC, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 9, 1995

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QUESTIONS PRESENTED

1. Was the court of appeals correct in ruling, contrary to the vast majority of the other courts of appeals that have considered the issue, that the Employee Retirement Income Security Act ("ERISA") gives employers a statutory right to terminate welfare benefits for retirees and their spouses at any time, for any reason, and consequently plan beneficiaries must show a clear and express waiver of that right in order to claim such benefits?

2. In deciding whether to enforce a claim that retiree health benefits were terminated in violation of employer commitments to the contrary, what evidence of employer promises to continue the benefits may the court consider?

PARTIES TO THE PROCEEDING

In addition to parties listed on the cover, the petition seeks relief against Fort Howard Corporation, Fort Howard Cup Corporation, Howard Cup Corporation Medical Plan and its Plan Administrators, John Does 1 through 10, Sweetheart Medical Plan and its Plan Administrators, John Does 11 through 20, as respondents. No persons other than petitioners and respondents were parties to the proceedings in the lower courts.

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SWEETHEART CUP COMPANY, INC., SWEETHEART HOLDINGS, INC., FORT HOWARD CORPORATION, FORT HOWARD CUP CORPORATION, HOWARD CUP CORPORATION MEDICAL PLAN AND ITS PLAN ADMINISTRATORS, JOHN DOES 1 THROUGH 10, SWEETHEART MEDICAL PLAN AND ITS PLAN ADMINISTRATORS, JOHN DOES 11 THROUGH 20,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert Gable, Harvey Spies, John Foley and Eugene Foreman, on behalf of themselves and as representatives of a class of persons similarly situated, petition the Court to

grant certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals is reported at 35 F.3d 851, and is set forth in the Appendix to this Petition at 1a to 15a ("App. 1a-15a"). The unreported report and recommendation of the magistrate judge, granting summary judgment to respondents, is set forth at App. 25a-44a, and the unreported orders of the district court adopting this report and recommendation are set forth at App. 18a-24a.

JURISDICTION

The court of appeals issued its opinion and judgment on September 18, 1994, and denied a timely petition for rehearing in an order dated October 12, 1994, that is set forth at App. 16a-17a. On December 21, 1994, the Chief Justice extended the time to file a petition for a writ of certiorari until February 9, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, contains the following relevant provisions:

Part I — Reporting and Disclosure

Section 101 [29 U.S.C. § 1021] Duty of Disclosure and Reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan —

(1) a summary plan description described in section 1022(a)(1) of this title.

Section 102 [29 U.S.C. § 1022] Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. . . .

Part II — Participation and Vesting

Section 201[, 29 U.S.C. § 1051] Coverage

This part shall apply to any employee benefit plan . . . other than

(1) an employee welfare benefit plan;

* * *

STATEMENT

During the period of tremendous economic growth and rising standards of living from the end of World War II through the 1970's, employers provided employees with increasing levels of fringe benefits as well as wages, and encouraged them to rely on their expectations of receiving such fringe benefits in planning for financial security after they retired. Such provisions were intended to encourage employees to remain with their current employer, and were seen as such by both employers and employees. The provisions thus benefited employers, by ensuring a stable work force and reducing their costs for recruitment and training new employees. However, particularly since 1980, many companies have tried to save money by reducing their financial obligations, and spiraling health care costs have led companies to drop prior commitments to provide full health insurance for their employees. One particularly easy target for such savings has been retirees, on whose good will and continued productivity these companies no longer rely.

As a consequence, courts have increasingly had to deal with cases in which retirees have tried to enforce what they considered to be binding promises of continued health insurance during retirement, against companies that claim that they never made such promises. Unfortunately, the lower courts are hopelessly divided over the analytic approach to be used to resolve these disputes. This case presents the questions of what standard should be followed in deciding whether an employer's promise is enforceable, and what evidence of employer promises should be considered in resolving the question.

A. Facts

Because the court below affirmed the district court's grant of summary judgment dismissing the action, the following account is based on the evidence on which

petitioners relied in opposition to summary judgment. Petitioners are retirees who spent their working careers in the employ of the Maryland Cup Corporation (which was later purchased and administered by the various respondents that were named as defendants in this action), and who all retired before October 1, 1985.[1] In the mid-1950's, Maryland Cup established a health care plan, and purchased a group insurance policy providing this and several other benefits from the John Hancock Insurance Company. Although the policy was amended in several respects over the years, beginning in 1972 it consistently provided that, although individual workers would lose coverage upon leaving the company's employ, those who left their employment by retirement would continue to receive health insurance coverage (supplemental to social security or medicare coverage) and that, once the retiree died, coverage would continue "for the lifetime of the dependent spouse."

The Employee Retirement Income Security Act ("ERISA") requires employers to "vest" their employees' **pension** rights after a minimum term of years, but does not require employers to vest their employees' rights under **welfare** plans. Nevertheless, such rights may be vested if the employer makes a binding commitment to do so, and the ultimate question in this case is whether the health coverage promised to retirees became "vested."

It was undisputed below that Maryland Cup repeatedly told its employees over the years that their health benefits would continue into their retirement at company expense. According to the uncontradicted testimony of employees, managers, and former directors of Maryland Cup, these

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[1] For the purpose of this petition, there is no significant difference between the status of the various respondents. Thus, when referring to actions of Maryland Cup Corporation, the petition refers generally to "respondents," although technically Maryland Cup is not itself a party to the case.

promises were delivered orally, both individually and at group meetings and presentations, and in writing, particularly when employees were contemplating retirement.

For example, as the court of appeals recognized, "Maryland Cup also issued to its retiring employees a document known as Schedule II, which described the level of health care benefits that each individual employee would receive after retirement. The Schedule II forms told the retiring employees that the company would 'continue this Coverage for you during the remainder of your lifetime at company expense.'" App. 4a. The Schedule II forms also promised that "Maryland Cup will continue to carry this insurance on your dependent spouse . . . at company expenses [sic] for the remainder of her (or his) lifetime . . . ."[2] According to a "Schedule III" that was also distributed to employees who stated their intent to retire, the Schedule II's and other documents referenced in the Schedule III "constitute, in their entirety, the official record of Benefit Entitlement under these plans." And in other documents given to employees, Maryland Cup repeatedly portrayed its promises of health care coverage after retirement as part of the package of "future security" that workers were earning through their continued loyalty to their employer, and that would cost workers thousands of dollars if they were not employed by the company.

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[2] Subsequent Schedule II's were worded differently, stating with respect the retiring employee that Major Medical "is limited to a maximum amount . . . for your lifetime and is subject to your deductible amount of $100 . . . . The cost of this coverage is paid for you by Maryland Cup Corporation. This lifetime maximum is not subject to reinstatement." Coverage for dependent spouses was described in similar language, with the added proviso that "[i]n the event your Dependent Spouse survives your death, (s)he will continue to be covered by Maryland Cup Corporation so long as (s)he does not thereafter remarry."

When ERISA was enacted, Maryland Cup never formulated a separate "plan document" describing the benefits and conditions of its employees' health care coverage. Instead, it simply filed its existing insurance policy with Department of Labor. Buried on page T-62 of this 200-page document appeared the following disclaimer:

> This policy may be amended or discontinued at any time by written agreement between the company [John Hancock] and the holder thereof [Maryland Cup] without the comment or notice to any employee or beneficiary . . ..

Copies of the policy were never distributed to the employees themselves. Nor was any Summary Plan Description ("SPD") containing this reservation, or indeed any other disclaimer that might arguably reserve the right to revoke the company's repeated promises of lifetime health benefits, ever distributed to the plaintiff class before they retired.[3] The only simplified explanations of their welfare benefit plans that were distributed to employees contained the promises of medical insurance during retirement at company expense, with no disclaimer that the company would not pay for such benefits if it changed its mind about doing so.

In 1983, Maryland Cup Corporation was purchased by respondent Fort Howard Corporation, which in turn established it as respondent Fort Howard Cup Corporation. In 1985, the Fort Howard respondents opted to convert their

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[3] No SPD was distributed to the members of the petitioner class while they were still employed. During calendar year 1985, after Maryland Cup had been purchased by respondent Fort Howard, but before the new employer issued a plan document containing an express right to suspend or terminate retirement health benefits, about 35 members of the class who retired during that period received Schedule II's on which a claimed right to alter or amend had been typed in.

insurance-based welfare plan to a self-funded plan, and in connection with this change they issued a formal plan document that purported to establish a new welfare benefit plan for those who continued in its employ.[4] Although the new plan provided significantly lower benefits for active employees, respondents assured the pre-October 1985 retirees that they would continue to receive "the same level of coverage indicated in your retirement package with **no change** in your program" (emphasis in original). This new plan contained a specific reservation of the right to amend, and in 1986 an SPD was written and distributed to employees, which specifically reserved respondents' right to "modify, change or even terminate the medical coverage for retirees" that was provided by that plan.

In 1989, respondent Sweetheart Holdings, Inc. acquired respondent Fort Howard Cup and established respondent Sweetheart Cup Company, Inc. Then, effective June 1, 1989, respondents drastically reduced the health benefits that the pre-October 1985 retirees had been receiving, by both requiring retirees to pay premiums for the coverage, and decreasing the level of benefits that would be provided, even with these payments.

B. Proceedings Below

Petitioners filed this action in the United States District Court for the District of Maryland on January 24, 1990, asserting jurisdiction under 29 U.S.C. § 1132. Their amended complaint alleged that respondents had promised petitioners that, upon retirement, they and their spouses would receive fixed levels of medical benefits for life, that respondents had never notified them through SPD's or otherwise that these benefits might be revoked, and that

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[4] The parties disputed whether this new plan covered the members of the plaintiff class, who had by then retired.

respondents had breached these promises. Under Rule 23(b)(2) of the Federal Rules of Civil Procedure, the district court certified a class consisting of all retired employees of respondent Sweetheart Cup Company (and its predecessors) who had retired before October 1, 1985, but remained participants in the medical plan on June 1, 1989, as well as their spouses.

The parties joined issue over whether respondents had made an irrevocable promise of lifetime health benefits for the class, or whether the hidden reservation in Maryland Cup's insurance policy gave it the right to terminate any and all health insurance benefits at any time for any or no reason. Petitioners advanced a number of arguments to support their contention that such an irrevocable promise had been made. They pointed first to the language in the policy itself, which provided for payments for full medical insurance for retirees and their dependent spouses up to age 65, and thereafter for major medical coverage to supplement Medicare A and B. The policy further provided that, after the employee died, a dependent spouse would receive medical insurance for the balance of his or her lifetime. These promises, they argued, were confirmed both by the original Schedule II promises to provide coverage "for you during the remainder of your lifetime at company expense," and the statements in later Schedules II providing for "lifetime maximum" payments.

Petitioners next argued that a promise of "lifetime" health benefits would be meaningless if the company could, at its election, decide at any point during any retiree's life to eliminate those benefits. There was, therefore, an inconsistency between the promise of lifetime benefits and the provision for termination of the policy, and this inconsistency rendered the plan documents ambiguous even if only the policy could properly be considered. They also pointed out that, even if an employee had received and reviewed the insurance policy and deciphered the provision allowing the "policy" to be "terminated," he could reasonably have understood that to mean only that the

employer reserved the right to terminate John Hancock's participation and switch to another company, not that the health benefits themselves might be eliminated. This argument was supported by several of the officers, directors, and personnel managers of Maryland Cup who testified that, when they made the promises of lifetime benefits on behalf of the employer, it was their intention to make a binding, irrevocable commitment to provide at least that level of retiree health benefits, and that the right to terminate the policy was not intended to vitiate that promise.

Respondents contended, for their part, that references to payment by the company for health coverage with a "lifetime maximum" should not be construed as a promise of lifetime coverage. Moreover, they argued that on each occasion when they had told employees about the provision for lifetime retiree health benefits, they had only been referring to benefits as they were provided at that time, and pointed to the language in the insurance policy itself, stating that the policy could be terminated. Respondents also objected to petitioners' reliance on Schedules II and III on the theory that they were not plan documents.

The parties also disagreed about whether respondents had properly told the beneficiaries of their alleged reservation of the right to revoke the lifetime health benefit. Respondents contended that the SPD distributed in 1986 had specifically reserved the right to modify or even terminate the medical coverage for retirees. Petitioners argued, however, that the SPD had not been distributed to all members of the class, and that in any event, by the time it was disseminated to those class members who did receive them, those class members had retired, having continued in respondents' employ in reliance on the lifetime benefits that had previously been promised. Accordingly, it was too late for the company to revoke those benefits.

In a report that was adopted by the district judge, Magistrate Judge Catherine Blake granted respondents' motion for summary judgment. She began with the

proposition that, unlike pension plans, which must vest after a minimum period, ERISA does not require the vesting of welfare benefits, and consequently such benefits may be changed unless the employer has made a commitment not to do so. App. 26a-27a. In deciding whether the employer has made such a commitment, courts are to look to the intent of the parties, as expressed in the written plan, and the plan is to be construed in accordance with the principles of contract law. *Id.* 27a. In that regard, courts must look first to the actual language of the plan, but if that language is ambiguous, the court should consider extrinsic evidence. *Id.* 27a-28a.

After a discussion of the caselaw in the Fourth Circuit and elsewhere on the question of whether an employer has adequately reserved the right to terminate health benefits after retirement, the magistrate judge stated that a "related, more fundamental" question had to be answered: "does the plan unambiguously demonstrate the employer's intent to vest these benefits upon an employee's retirement?" *Id.* 34a. In that regard, the magistrate judge acknowledged that, considered by itself, the language pertaining to health benefits for retirees and their surviving spouses could be construed to contain an "apparent promise of vesting." *Id.* However, in the magistrate judge's view, the policy's other language providing for termination of the "policy" overcame any such promise of vesting of "benefits." *Id.* Thus, even though she acknowledged that the extrinsic evidence was sufficient to bar summary judgment for the respondents, *id.* 36a n.12, she concluded that such evidence could not be considered under the existing legal standard.

Turning from the issue of the construction of plan documents to respondents' communication of their reservation of the right to amend or terminate benefits, the magistrate judge decided that, although certificates of insurance recited the existence of the power to amend, they did not qualify as SPD's, both because they did not contain the information required by law, and because they were not

written in language calculated to be understood by the average plan participant. *Id.* 42a. Moreover, other documents, such as the Schedule II's and various brochures given to employees, clearly told employees that they were guaranteed lifetime health benefits, without any indication that those benefits might be revoked at the employer's whim. *Id.* 38a-40a. Thus, it was not until the 1986 SPD's that respondents clearly explained to beneficiaries that the company had reserved the power to revoke their retiree health benefits. *Id.* 40a.

However, the magistrate judge declined to afford petitioners any relief based on a failure to give proper notice because such notice **was** properly given in the 1986 SPD's, three years before the right to amend was actually invoked, even though the entire class of petitioners was already retired. In those circumstances, she found it unlikely that the lack of notice had caused prejudice to any petitioner. Accordingly, she recommended that respondents' motion for summary judgment be granted, but that petitioners be given an opportunity to request reconsideration if individual class members could show specific prejudice from the failure of notice. *Id.* 43a-44a. The district judge adopted this recommendation, *id.* 19a-24a, and when petitioners presented no such evidence within thirty days, judgment was entered against petitioners. *Id.* 17a-19a.

On appeal, petitioners focused their argument on the portion of the magistrate judge's report that made the success of their claim depend on a showing that the plan "unambiguously demonstrate the employer's intent to vest these benefits upon an employee's retirement." This approach, they argued, amounted to a strong presumption against vesting, and stood on its head the normal rule that extrinsic evidence may be considered in determining the meaning of a contract so long as the contract's language is ambiguous. Moreover, petitioners objected to the district court's failure to consider Schedules II and III as plan documents in deciding whether the plan's promise of vesting

was sufficient to avoid summary judgment. And, with respect to the supposedly unambiguous reservation of the right to amend, petitioners argued both that the reservation, by referring to the "policy," rather than the benefits, itself created ambiguity, and that there was a fundamental inconsistency (which created a further ambiguity sufficient to warrant consideration of the extrinsic evidence) between the reservation of a right to amend or terminate the policy and the promises to provide "lifetime" health benefits to retirees and their surviving spouses.

Petitioners also argued that, regardless of whether the plan itself vested their lifetime health benefits, respondents' failure to provide beneficiaries with an SPD notifying employees of their alleged right to reduce or eliminate those benefits precluded the invocation of that right of amendment. Even the 1986 SPD was not effective for this purpose, they contended, because it applied only to the medical plan that took effect after petitioners retired.

Nevertheless, in an opinion by Honorable J. Harvie Wilkinson, the court of appeals affirmed. It began with the proposition that ERISA requires employers to vest pension benefits, but not welfare benefits. App. 7a. According to the court, this exception gives employers "a statutory right to amend the terms of the plan or to terminate it entirely." *Id.* (punctuation omitted). Having phrased its analysis in terms of a statutory right, the panel proceeded to apply a waiver standard to petitioners' argument that respondents had made a contrary commitment. Thus, the court said, quoting the Fifth Circuit's decision in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (1993), an employer "may waive its statutory right to modify or terminate benefits," but "courts may not lightly infer the existence of an agreement to vest employee welfare benefits." *Id.* Rather, the right to a fixed level of lifetime benefits "must be found in the plan documents and must be stated in clear and express language." *Id.* 7a-8a. Petitioners had not met this burden

because the insurance policy contained a modification clause that expressly reserved the right to amend the "policy," and

> this express reservation of the company's right to modify or terminate the participants' benefits is plainly inconsistent with any alleged intent to vest those benefits. Therefore, we hold that the modification clause, standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits and thus waived its statutory right to modify or terminate the health benefit plan.

Id. 8a (punctuation and citations omitted).

The panel continued that the modification clause's use of the word "policy" "does not limit the company's amendment right," because the policy constituted the entirety of the plan. *Id.* 9a. The panel further held that the modification clause applied to all beneficiaries, both active employees and retirees. *Id.* 9a-10a. Nor did the Schedule II's "nullify the company's right to modify," because, even though they referred to "lifetime benefits," they were informal communications that do not govern the company's obligations under the plan. *Id.* 10a. The panel recognized that companies often provide plan participants with communications about their benefits that "tend to sound promissory by their very nature," but it ruled that companies should not be bound by such apparent promises lest the predictability of their future liabilities be undermined. *Id.* 11a.

> Benefit descriptions cannot be translated into guarantees that benefits will never be altered, especially where, as here, the descriptions fall well short of the precise language denying the right to withdraw benefits that courts require to find the creation of a vested right. [citation

> omitted] Therefore, we hold that the plaintiff retirees' benefits did not vest, and that the company retained its statutory right to modify or terminate the plan at any time.

Id. 11a.

The panel also rejected petitioners' claims based on respondents' failure to provide an SPD giving proper notice of its right to amend. First, the court said, the right to amend is provided by the statute itself, and SPD's need not notify plan participants that it has given up that right. *Id.* 12a. And, in any event, the right to receive notice in an SPD is satisfied so long as the employer provides that notice at some time before the modification or termination occurs. Here, the 1986 SPD's asserted the right to alter the health benefits for retirees "at any time in the future," and that right was not exercised until 1989, years after the last members of the petitioner class retired. *Id.* 13a. And although the plaintiff class claimed that they did not receive these SPD's, none of them was able to show harm based on the failure to receive the 1986 SPD's. Thus, "the plaintiffs failed to carry their burden of proving that the 1986 SPD was insufficient to provide proper notice of the company's right to modify or terminate the plan." *Id.* 14a.

Petitioners' petition for rehearing and suggestion of rehearing *en banc* were denied.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Review to Begin to Resolve the Hopeless Conflict Among the Circuits About the Standards to Be Used Under ERISA in Deciding Whether an Employer Has Made an Irrevocable Promise to Pay Retiree Health Benefits and the Types of Evidence that May Be Considered.

1. The Standards Issue

An employer's obligation to provide benefits that are not required by ERISA is based on contract; in this situation, ERISA's role is to provide an effective way for retirees to enforce the employer's promises embodied in such contracts. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-113 (1989); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-375 (1980). The Court in *Firestone* was reluctant to approve a standard of review for enforcing trust agreements "that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 489 U.S. at 113-114. Because the pre-ERISA common law called for the application of ordinary contract principles, no weaker standard should be applied under ERISA. And, in fact, the courts of appeals have routinely applied contract principles to decide whether an employer has violated a promise to provide any benefit that is not required by ERISA itself, and they have used contract principles specifically in cases involving employer claims of the right to terminate retiree health insurance. *E.g.*, *Jensen v. SIPCO*, 38 F.3d 945, 949 (8th Cir. 1994); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 701-702 (11th Cir. 1993); *Policy v. Powell Pressed Steel*, 770 F.2d 609 (6th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984).

The court below never embraced the proposition that contract principles should be applied, even though previous decisions from the same circuit had treated plan interpretation as a matter of contract. *E.g.*, *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992) ("the principles of contract law [are applied] to ascertain the intent of the parties, or the settlor if the Plan was not negotiated"). Instead, the court treated ERISA's failure to require vesting of retiree health benefits as the creation of a statutory right to revoke such benefits at will, App. 7a, and then proceeded to require employees claiming a promise not to revoke to prove that the employer had "waived" this "statutory right" using the standard often applied to claims of waiver — whether the waiver was expressed in "clear and express" language in the plan itself. *Id.* 7a-8a. *Cf. Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In this regard, the Fourth Circuit followed the Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (1993). Under this approach, if the contract is ambiguous, then that is the end of the case — the retirees lose their claim because the waiver is not crystal clear.

This elevation of ERISA's **failure** to require the vesting of retirement health benefits into a **right** not to provide them, which may only be defeated by express language in the single plan document, is inconsistent with this Court's decisions and with the decisions of most lower courts that call for the application of contract principles. Although these other circuits have not been able to agree on a single approach to this question, they have uniformly refused to erect the Fourth and Fifth Circuit's formidable barrier to the claims of retirees. In every other circuit, it is enough that the benefit plan contains ambiguous language that might be read to imply a commitment to provide lifetime health benefits. In that event, the courts resort to other construction aids, including such extrinsic evidence of the parties' intent as expressions of intent by the sponsor, expressions of understanding by the beneficiaries, past practice under the

agreement, and the like. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993)(*en banc*); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993); *Alexander v. Primerica Holdings*, 967 F.2d 90, 96 (3d Cir. 1992); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 613 (6th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984).

Even among these circuits, there is great disagreement about whether language conferring health benefits on retirees should be presumed to vest such benefits or presumed not to vest them, and, in either case, how strong the presumption should be. The approach most favorable to retirees was taken by the Sixth Circuit in *UAW v. Yard-Man*, 716 F.2d 1476 (1983). That court held that the very provision of health benefits, which accrue upon the achievement of retiree status, creates an inference that the parties providing the benefits likely intended those benefits to continue as long as the beneficiary remains a retiree, notwithstanding any general provision providing for the amendment of the agreement. *Id.* at 1482.[5] Although *Yard-Man* was itself decided in the context of a suit to enforce a collective bargaining agreement under section 301 of the LMRA, the Sixth Circuit has since repeatedly applied it in ERISA suits. *Smith v. ABS Industries*, 890 F.2d 841, 845-846 (1990); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 613-614 (6th Cir. 1985). *Accord*, *Steelworkers v. Connors Steel*, 855 F.2d 1499, 1505 (11th Cir. 1988) (expressly endorsing *Yard-man*); *Steelworkers v. Textron*, 836 F.2d 6, 9 (1st Cir. 1987)

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[5] ERISA expressly requires benefit plans to provide for the amendment of the plan. Section 402(b)(3), 29 U.S.C. § 1102(b)(3). If the mere existence of such a provision were sufficient to negate employer promises of lifetime health benefits for retirees, then employers could routinely make such promises, induce employees to remain on the basis of such promises, and then break their promises at will.

(Breyer, J.) (finding likelihood of success in preliminary injunction context where agreement said retiree medical benefits "shall be provided" and "Company shall pay," citing *Yard-Man* inference); *Joyce v. Curtiss-Wright Corp.*, 810 F. Supp. 67, 72 (W.D.N.Y. 1992) ("most circuits have adopted the *Yard-Man* approach"). *See generally* Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective*, 10 Labor Lawyer 91 (1994) (collecting cases).

The *Yard-Man* approach was endorsed by three judges, concurring in the Seventh Circuit's *en banc* decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (1993), who identified six alternative approaches to the problem, but concluded that, particularly for plans developed before 1980, a court should infer an intent to create irrevocable lifetime benefits absent proof to the contrary. *Id.* 611-613. *See also Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538-541 (9th Cir. 1990) (holding, in a case not involving retiree health benefits, that benefit provisions must be construed against the drafter under the rule of *contra preferentum*).

The plurality opinion in *Bidlack*, authored by Circuit Judge Posner, adopted still a third rule under which, when provisions concerning retiree health benefits are ambiguous with respect to duration, the proper course is to look at the extrinsic evidence bearing on the meaning that the parties gave to their contract, with the burden resting on the plaintiffs to show an intention to vest the benefits. The plurality rejected the proposition, adopted by the Fourth Circuit in the decision below, that a strong presumption against vesting is required to prevent retirees from presenting their extrinsic evidence in favor of vesting, on the ground that it was based on "an extreme mistrust of juries" that was "not easy to reconcile with the Seventh Amendment," and on the ground that any employer that wants to avoid that prospect need only use unambiguous language limiting the term of the promise. 993 F.2d at 609. Four dissenting judges, in an opinion authored by Judge Easterbrook, would

have allowed vesting only if the agreement provided for the continuation of benefits "in explicit terms," *id.* at 617, an approach similar to the rule followed in the Fourth and Fifth Circuits.

The pension agreement in *Bidlack* contained a benefit provision which, as summarized by the plurality opinion, was in some respects similar to this one: "[t]hey say that once retired employees reach the age of 65 the company will pick up the full tab for their health insurance and that when they die their spouses will continue to receive supplemental health benefits, again at the company's cost." *Id.* at 608. The plurality found this language ambiguous, even though the agreement also had an explicit expiration date, and so the district court's grant of summary judgment was reversed, and the case remanded for trial on the meaning of the contract.

Here, the court of appeals never considered the extrinsic evidence to determine the meaning of the retiree health benefit provisions, because, contrary to almost every other circuit, its view was that once the court determined that the language of this provision did not unambiguously favor the retirees, its task was at an end. The other courts of appeals have been almost uniform in adopting other standards, but after fifteen years of grappling with this issue, following the seminal decision in *Yard-Man*, they have been unable to agree on a single approach. The time has come for this Court to intervene in the controversy, and to develop the rules that should be applied in such cases.

2. The Type of Evidence to Be Considered

The second reason why the Court should grant review is to decide whether the courts below were correct in completely disregarding the numerous documents, issued by the respondents and provided to the plan participants, that described the retiree medical benefits as "lifetime" benefits on which employees and their families could rely in planning for their financial security. The court below refused to

consider the various benefit brochures, or the schedules that were issued to employees and denominated by the company as "the official record" of their benefits upon retirement, because they were not "the plan document", and because the company did issue an SPD after the class in this case had all retired in which it asserted its right to unilaterally retract those health benefits. The court below explained that a company should be able to rely on its formal plan documents to predict its future liabilities.

But the Fourth Circuit's approach is analytically backward. ERISA is not concerned solely, or even primarily, with an employer's ability to predict its future liability for benefits. To the contrary, as this Court has stated, ERISA was enacted to enable **employees** to plan for their futures, and to enable them to enforce the company's promises of benefits. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-375 (1980). To that end, section 102 of ERISA, 29 U.S.C. § 1022, requires every employer that creates a pension or welfare benefit plan to give all participants a "summary plan description ["SPD"], . . . written in a manner calculated to be understood by the average plan participant, and . . . sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." The lower courts are in accord that, when there is an inconsistency between more generous benefits provided in the SPD, and the less generous terms in the official plan document itself, the beneficiary may rely on the terms of the SPD. *E.g.*, *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988). And in the recent case of *Jensen v. SIPCO*, 38 F.3d 945, 949, 952-953 (8th Cir. 1994), the Eighth Circuit held that summary descriptions are among the "ERISA plan documents" that must be considered both in determining the settlor's intent and in deciding whether the plan is

sufficiently ambiguous to warrant consideration of extrinsic evidence.

Here, respondents failed to issue or distribute to its employees and beneficiaries **any** document that contained all of the features required in an SPD until after the petitioner class had retired. However, they did create a form document, describing the benefits on which prospective retirees were supposed to rely — indeed, it described the packet as "the official record" of their benefit package — which was routinely provided on the eve of retirement to each member of the petitioner class. They also distributed numerous brochures and personalized benefit statements that described "lifetime" retiree medical benefits, and assured employees that such benefits "will be paid."

The refusal of the court below to consider these documents in deciding whether the plan guaranteed lifetime retiree health benefits, or whether there was sufficient ambiguity in the company's various promises to warrant consideration of extrinsic evidence, is contrary to the various decisions that require the consideration of official communications from the company that purport to summarize the benefits of employee welfare benefit plans. For example, in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606 (7th Cir. 1993) (*en banc*), the plurality opinion expressly required the lower court to consider a form issued to each newly retired employee in deciding what the employer had promised.

Nor is the reasoning of the Fourth Circuit in refusing to consider any written communications apart from "official plan documents" persuasive. Although it may be unfair for an employer to be charged with the alleged oral statements of every one of its supervisors, there is no reason why it should not be bound by its official standard forms and benefit brochures in determining its future liabilities. Indeed, employers are **required** by the Act to provide their employees with readily-comprehensible statements of their rights and obligations under the company benefit plans, and

there is no reason why the company should not honor all such standardized communications with employees, instead of just the single document that it has chosen to describe as its plan, especially when the forms, but not the policy itself, are provided to the employees.

As Judge Posner explained in *Wheelabrator*, an employer that is adamant against assuming perpetual obligations need only ensure that its descriptions of its plan's benefits are qualified by a definite expiration date. 993 F.2d at 609. An employer that fails to take such care has only itself to blame if a court later holds it liable.

Insofar as the lower court held that respondents were relieved of their responsibilities by the inclusion in the 1986 SPD of a proviso asserting that retiree health benefits might be changed at a later date, the decision is flatly contrary to *Jensen v. SIPCO*, 38 F.3d 945, 949, 952-953 (8th Cir. 1994). In that case, the employer followed a two-step process to revoke a prior commitment to lifetime benefits. First, in January 1989, SIPCO issued an SPD that notified beneficiaries that it reserved the right to abolish or modify this benefit for persons who retired after March 1, 1989; then in April 1989, it issued a second SPD, actually modifying the benefit for persons retiring between January 1 and March 1, 1989. When a class of persons retiring before March 1, 1989 sued, the court was willing to consider only the pre-1989 SPD's in deciding whether, at the time the class had retired, the employer had reserved the right to alter retiree health benefits. The holding below — that post-1985 SPD's may be considered in deciding whether petitioners who retired on or before October 1, 1985, may enforce the promise to pay for major medical insurance for all retirees and their spouses during their retirement — is squarely contrary to the decision in *SIPCO*, which provides still an additional reason why the Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 9, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT GABLE; HARVEY SPIES; JOHN FOLEY; EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

SWEETHEART CUP COMPANY, INCORPORATED, a Delaware Corporation; FORT HOWARD CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION MEDICAL PLAN, and its plan administrators, John Does 1 through 10,

Defendants-Appellees,

and

SWEETHEART HOLDINGS, INCORPORATED, a Delaware Corporation; SWEETHEART CUP MEDICAL PLAN, and its plan administrators, John Does 11 through 20,

Defendants.

No. 94-1234

ROBERT GABLE; HARVEY SPIES; JOHN FOLEY; EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

SWEETHEART CUP COMPANY, INCORPORATED, a Delaware Corporation; FORT HOWARD CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION MEDICAL PLAN, and its plan administrators, John Does 1 through 10,

Defendants-Appellees,

and

SWEETHEART HOLDINGS, INCORPORATED, a Delaware Corporation; SWEETHEART CUP MEDICAL PLAN, and its plan administrators, John Does 11 through 20,

Defendants.

No. 94-1301

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-90-268)

Argued: July 18, 1994

Decided: September 13, 1994

Before WILKINSON and LUTTIG, Circuit Judges, and
TRAXLER, United States District Judge for
the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Traxler joined.

COUNSEL

ARGUED: John Thomas Ward, QUINN, WARD & KERSHAW, P.A., Baltimore, Maryland, for Appellants. Charles Ross Diffenderffer, MILES & STOCKBRIDGE, Towson, Maryland, for Appellees. **ON BRIEF:** Thomas Joseph Minton, Kathryn Miller Goldman, QUINN, WARD & KERSHAW, P.A., Baltimore, Maryland, for Appellants. Gary C. Duvall, MILES & STOCKBRIDGE, Towson, Maryland, for Appellees.

OPINION

WILKINSON, Circuit Judge:

The question before us is whether a company violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, by decreasing its retirees' medical benefits provided under an employee welfare benefit plan. We find that the company possessed a statutory right to amend or terminate the employee welfare benefit plan and that the plan documents in no way waived that right. Accordingly, we affirm the district court's grant of summary judgment to the company.

I.

This case arises out of an employee welfare benefit plan established by Maryland Cup Corporation and its successors. In the 1950s, Maryland Cup contracted with John Hancock Insurance Company,

which issued to Maryland Cup a "master policy" providing comprehensive medical and life insurance to all Maryland Cup employees, retirees, and their dependents.

In 1974, when ERISA was enacted, Maryland Cup filed the John Hancock master policy with the Department of Labor and thereby established an employee benefit plan known as "The Maryland Cup Corporation Medical Plan." Section T of the master policy, the "General Provisions" section, contained the following "Modification and Reinstatement of Policy" clause:

> This Policy may be amended or discontinued at any time by written agreement between the Company and the holder thereof without the consent of or notice to any employee or beneficiary or any other person having a beneficial interest in said Policy ....

Plan participants did not receive personal copies of the master policy at that time, but did receive individual certificates of insurance, which stated that

> [t]he Policy(ies) under which this certificate is issued may at any time be amended or discontinued by agreement between the Insurance Company and the Policyholder without the consent of or giving of notice to the Insured Person.

Since the plan has been in effect, the company has amended it many times; with each amendment, the company has distributed "inserts" to the individual certificates of insurance informing the plan participants of the latest revisions.

In addition to distributing the certificates, Maryland Cup also issued to its retiring employees a document known as Schedule II, which described the level of health care benefits that each individual employee would receive after retirement. The Schedule II forms informed the retiring employees that the company would "continue this Coverage for you during the remainder of your lifetime at company expense."

In 1983, Fort Howard Company acquired Maryland Cup and assumed responsibility for the company's employee welfare benefit plan. On October 1, 1985, Maryland Cup[1] converted the plan into a self-insured plan. All the substantive terms of the plan remained the same, however, and John Hancock Insurance Company retained responsibility for administering the amended plan. Maryland Cup advised all plan participants of the pending amendment in September 1985.

The official plan document for the 1985 amended plan, like the original master policy, contained a modification clause stating that "[t]his Plan can be amended[,] modified or terminated at any time by action of the Employer . . . ." In addition, the company inserted the following modification clause in all Schedule II documents distributed to retiring employees under the amended plan:

> Whether or not medical coverage will be continued for you as a retiree, and at what level of benefits[,] will depend upon the particular plan provisions and Company policy in effect at any specific time in the future.

In 1986, the company distributed a detailed Summary Plan Description ("SPD") for the amended plan to all plan participants, including all retired employees. The SPD contained the same modification clause quoted above, and also informed the participants that

> Maryland Cup Corporation reserves the right to modify, change or terminate the medical coverage for retirees at any time in the future, just as it does for active employees.

In 1989, Sweetheart Cup Company acquired Fort Howard/Maryland Cup. Faced with rising health care costs, Sweetheart Cup decided to make significant changes to the employee welfare benefit plan. The company notified all plan participants that, as of June 1, 1989, the plan would be amended to reduce benefits, increase

[1]After Fort Howard's acquisition of Maryland Cup, the company's name remained unchanged for a long period. We accordingly refer to the company under Fort Howard's control as Maryland Cup.

deductibles, and require each participant to pay a portion of the insurance premiums.

In January 1990, several Maryland Cup retirees filed suit against Sweetheart Cup and its predecessors in federal district court, claiming that their benefits had vested at the time of their retirement and that the 1989 benefit reduction amendment therefore violated ERISA. The district court certified a class of plaintiffs including all of defendants' retired employees (and their beneficiaries) who retired before October 1, 1985, and were participants in the plan as of June 1, 1989. At summary judgment, the magistrate judge issued a report and recommendation finding that (1) the ERISA plan here unambiguously reserved to defendants the right to amend or terminate the employee benefits and therefore failed to demonstrate any intention to vest those benefits at retirement, and (2) defendants failed to provide plaintiffs with an SPD prior to October 1, 1985, but distributed an SPD in 1986 that adequately notified plaintiffs of defendants' right to amend the plan at any time.

In January 1994, the district court adopted the magistrate judge's report and recommendation, and granted summary judgment to defendants. The court stated, however, that this decision was subject to reconsideration upon any individual plaintiff's showing of reliance or prejudice caused by failure to receive the 1986 SPD or any other notification of defendants' right to amend the plan. Because no member of the plaintiff class attempted to make this showing within the requisite thirty-day period, the district court dismissed the case. Plaintiffs now appeal that ruling.

II.

A.

Plaintiffs' primary contention on appeal is that Sweetheart Cup violated ERISA by modifying the company's health insurance plan. Plaintiffs argue that they had a vested right to receive lifetime benefits after retirement, and that the company thus had no right to unilaterally change the level of their benefits.

We disagree. It is well-established that ERISA does not prohibit a company from terminating or modifying previously offered benefits that are not vested. *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 397 (11th Cir. 1993). Although ERISA contains a strict vesting requirement for pension benefits, it expressly exempts employee welfare benefit plans from that requirement. *See* 29 U.S.C. § 1051(1); *Sejman v. Warner-Lambert Co., Inc.*, 889 F.2d 1346, 1348 (4th Cir. 1989). Accordingly, a plan participant's interest in welfare benefits is not automatically vested, and employers have a statutory right to "amend the terms of the plan or terminate it entirely." *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993). Because the health insurance benefit plan at issue here constitutes an "employee welfare benefit plan" under ERISA, *see* 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan" as any plan providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness"), the company possessed the right to change or terminate the medical benefits provided under the plan. *See Doe v. Group Hospitalization & Medical Servs.*, 3 F.3d 80, 84 (4th Cir. 1993) ("the employer may modify or withdraw [health care] benefits at any time"); *Wise*, 986 F.2d at 935.

An employer may "waive[ ] its statutory right to modify or terminate benefits," however, by voluntarily undertaking an obligation to provide vested, unalterable benefits. *Id.* at 937; *see Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993) ("the parties can agree to vest a welfare benefit plan"). Because such an obligation constitutes an extra-ERISA commitment, however, courts may not lightly infer the existence of an agreement to vest employee welfare benefits. *See Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988); *see also Howe v. Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990) (holding that courts may not infer an intent to vest from the "mere fact that employee welfare benefits continue in retirement"); *Wise*, 986 F.2d at 938 (holding that "silence" as to an employer's right to modify the plan does not "impliedly cede the right to later amend or discontinue coverage"). Rather, in recognition of ERISA's requirement that employee benefit plans be governed by written plan documents filed with the Secretary of Labor, *see* 29 U.S.C. §§ 1102(a)(1) & 1024(a)(1), any participant's right to a fixed level of lifetime benefits must be "found in the plan documents and

must be stated in clear and express language." *Wise*, 986 F.2d at 937; *see Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990). Moreover, plaintiffs bear the burden of proving that their employer's ERISA plan contains a promise to provide vested benefits. *See Howe*, 896 F.2d at 1109; *Anderson*, 836 F.2d at 1517, 1521.

Plaintiffs in this case cannot meet their burden of proving that their health insurance benefits were vested under the Maryland Cup plan. Here, the John Hancock master policy constituted the relevant plan document governing plaintiffs' rights at the time of their retirement. An insurance policy may constitute the "written instrument" of an ERISA plan, *see Musto v. American General Corp.*, 861 F.2d 897, 900-01 (6th Cir. 1988), and the company filed the master policy with the Secretary of Labor. Nothing in the John Hancock policy indicated that the plan participants' health insurance benefits would vest upon retirement or at any other time. To the contrary, it specifically reserved the company's right to modify the plan by stating that "[t]his Policy may be amended or discontinued at any time . . . without the consent of or notice to any [plan participant]." Furthermore, the company retained its right to modify the plan when it changed the plan's funding mechanism in 1985; the amended plan document provided that "[t]his Plan can be amended[,] modified or terminated at any time by action of the Employer . . . ." This express reservation of the company's right to modify or terminate the participants' benefits is plainly inconsistent with any alleged intent to vest those benefits. *See Anderson*, 836 F.2d at 1519. Therefore, we hold that the modification clause, standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits and thus waived its statutory right to modify or terminate the health benefit plan. *See Alday*, 906 F.2d at 662, 666 (rejecting plaintiffs' claim of vested lifetime benefits where the plan document contained a modification clause similar to the one at issue in the present case); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 490, 492-93 (2d Cir. 1988) (same).

B.

Despite this clear modification clause, plaintiffs nonetheless urge us to interpret the plan document as containing a vesting requirement. Specifically, appellants argue that the modification clause does not

preclude vesting of their health benefits for two reasons. First, appellants maintain that because the clause provided that the "*Policy* may be amended or discontinued," it reserved only a right to change the particular insurance policy that the company purchased, not a right to change plan benefits in general. Second, appellants claim that the modification clause applied only to active employees, not to retired employees. Because documents other than the master policy, such as the Schedule IIs handed out to retiring employees, and testimony of Maryland Cup's former officers show that the company intended to provide "lifetime" benefits for retirees, plaintiffs conclude that the company could not modify their plan benefits.

We are not persuaded. First, the fact that the modification provision stated that the company may amend the "Policy" does not limit the company's amendment right, because the John Hancock master policy constituted the entirety of the company's welfare benefit plan. A company may establish an employee welfare benefit plan merely by purchasing a group policy for its employees, *see Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444, 447 (4th Cir. 1993), and the plan may consist of nothing but the purchased policy document, *see Musto*, 861 F.2d at 901. Therefore, Maryland Cup's reservation of its right to modify the policy was equivalent to a reservation of the right to modify plan benefits generally. *See id.* at 901-02 (holding that the employer had a right to amend the plan where the modification clause stated that "[t]his *policy* may be amended or changed at any time") (emphasis added).

Second, it is simply untrue that the modification clause at issue does not apply to retirees. To begin with, the modification clause itself provided that the right to modify applies to the rights of *all* plan participants, not just active employees; the clause permitted modification of the plan without consent of "*any* . . . person having a beneficial interest in [the] Policy." (emphasis added). Moreover, the Maryland Cup plan, by its own terms, established that retirees are considered employees for purposes of interpreting the terms of the plan; section L of the master policy stated that if an employee retires, "his employment shall be deemed to continue thereafter, for the purpose of this coverage, until terminated by his employer." Because section L further provided that an employee's insurance benefits may cease on "the date of termination of this Policy," it is apparent that the compa-

ny's express right to make amendments applied to benefits of retirees. *See Musto*, 861 F.2d at 902 (holding that a modification clause applies to retirees as well as to employees where the plan indicates that retirees will be considered employees for the purposes of the plan). Accordingly, we find that the plan clearly provided that retirees' benefits are subject to the employer's right to modify or terminate the plan.

In light of the fact that the master policy unambiguously reserved the company's right to modify or terminate the plan, we have no need to consider plaintiffs' extrinsic evidence in determining the extent of the company's rights and obligations under that plan. *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 57-58 (4th Cir. 1992); *Howe*, 896 F.2d at 1110. In particular, the fact that Schedule II documents referred to retirees' benefits as "lifetime benefits" does not nullify the company's right to modify, because the Schedule IIs are informal communications that do not govern the company's obligations under an ERISA plan.[2] ERISA prohibits informal written or oral amendments of employee benefit plans, *see* 29 U.S.C. § 1102(b)(3); *Alday*, 906 F.2d at 665, and references to lifetime benefits contained in non-plan documents cannot override an explicit reservation of the right to modify contained in the plan documents themselves. *See id.* at 665-66 (holding that booklets sent to retiring employees referring to lifetime benefits cannot nullify the plan document's explicit reservation of the right to amend the plan); *Moore*, 856 F.2d at 493 (holding that communications speaking of "lifetime" benefits "at no cost" do not "constitute the kind of misleading behavior" that overrides the plan documents' explicit reservation clause).

[2]Appellants contend that Schedule II documents are not *informal* communications, but must be considered "*official* plan documents" that accurately describe the terms of the plan. It is clear, however, that the Schedule IIs do not satisfy ERISA's requirements for plan documents. 29 U.S.C. § 1022 requires official plan descriptions to contain, *inter alia*, "the plan's requirements respecting eligibility for participation and benefits; . . . [and] the source of financing of the plan and the identity of any organization through which benefits are provided . . . ." 29 U.S.C. § 1022(b). The Schedule IIs at issue here do not describe the plan's terms in general or define eligibility requirements. Accordingly, they may not qualify as ERISA plan documents. *See Alday*, 906 F.2d at 665.

As a matter of statutory policy, ERISA places great weight on the written terms of the formal plan documents. *See Coleman*, 969 F.2d at 56. Congress expressed this "emphatic preference for written agreements" in ERISA in order to establish predictability as to an employer's future obligations. *Id.* at 58 (quoting *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989)); *see Moore*, 856 F.2d at 492. Here, the official plan document — the John Hancock master policy — unambiguously set out the company's right to terminate or modify the plan at any time. Were we to hold that other communications could nullify this express written term, plan documents would no longer serve to ensure predictability as to employers' future liabilities, and "consequently, substantial disincentives for even offering such plans would be created." *Id.* at 492.

There is a further reason why the explicit reservation of a right to amend in official plan documents cannot be overridden by informal communications. Such communications often contain explanations of plan benefits and tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future. In this case, the plan participants knew of this contingency because they received individual certificates of insurance that expressly informed them that the plan "may at any time be amended or discontinued . . . without the consent of or giving of notice to the Insured Person." Benefit descriptions cannot be translated into guarantees that benefits will never be altered, especially where, as here, the descriptions fall well short of the "precise language denying the right to withdraw benefits" that courts require to find the creation of a vested right. *Wise*, 986 F.2d at 938. Therefore, we hold that the plaintiff retirees' benefits did not vest, and that the company retained its statutory right to modify or terminate the plan at any time.

III.

Plaintiffs next contend that even if the company possessed the right to modify or terminate the plan, it failed to provide proper notice of its amendment right to plan participants. ERISA requires employers to give every plan participant a summary plan description that is "suf-

ficiently accurate and comprehensive to reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). Section 1022(b) further requires that an SPD state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). According to plaintiffs, § 1022(b) requires employers to warn plan participants of any possibility of decrease in their benefits by including a specific modification clause in the SPD. Because the district court found that Maryland Cup did not distribute any SPD containing a modification clause prior to the plaintiffs' retirement in 1985, plaintiffs contend that the company is estopped from claiming a right to amend their benefits.

We cannot accept this argument. The first flaw in plaintiffs' reasoning lies in the assumption that § 1022(b) requires employers to expressly notify plan participants of their statutory right to amend or terminate the plan. An SPD is designed to inform plan participants of the terms of the particular plan that the employer has established, not to educate them regarding all aspects of ERISA law applicable to employee benefit plans in general. It follows that § 1022(b) merely requires employers to explain in an SPD how an individual employee gains or loses "eligibility under *then existing*, current terms of the Plan," *Wise*, 986 F.2d at 935 (emphasis added) — *i.e.*, that employees may lose their coverage if they miss their premium payments or if they are fired from their job for misconduct. ERISA does not require SPDs to specifically address "the possibility that those terms might later be changed, as ERISA undeniably permits" for all employee benefit plans in general. *Id.*; *see also Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992) (per curiam) ("[I]t is arguable that, since the medical benefits under the plan were not vested the employer could change such benefits without any prior notice of that right as a matter of law. This seems to be the purport of our [case law]."). We hold therefore that an employer's failure to notify plan participants of its amendment right does not preclude the employer from properly exercising that right.[3]

[3]We must note that our holding that ERISA does not require notice of the employer's *right* to make modifications in no way relieves employers of the obligation to provide "notice to plan participants of [*actual*] changes in a plan's provisions and an opportunity after such notice for the participant to take action." *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 74 (4th Cir. 1989).

Second, even if § 1022(b) did require an employer to provide explicit notice of its right to amend or terminate the plan, we would still find that the company did not violate ERISA. As this court has recently held, any notice requirement that may be contained in § 1022(b) can be fulfilled by distributing an SPD containing a modification clause at any time before the modification or termination occurs. *See Pierce*, 979 F.2d at 28, 30. In *Pierce*, the employer issued an SPD without a modification clause during plaintiffs' employment; however, because the company later distributed a revised SPD with a modification clause four years before it implemented a decrease in benefits, the court held that the company provided adequate notice to plaintiffs of the possibility of such a decrease. *See id.* Here, although Maryland Cup did not issue SPDs prior to the retirement date of any of the plaintiffs, it did distribute an SPD immediately after it changed the funding mechanism of the plan in 1985, well before the challenged 1989 benefit reduction occurred. This SPD contained an unambiguous modification clause stating that "Maryland Cup Corporation reserves the right to modify, change or terminate the medical coverage for retirees at any time in the future . . . ." The SPD further explained that "[w]hether or not medical coverage will be continued for you as a retiree, and at what level of benefits, will depend upon . . . Company policy in effect at any specific time in the future." Because the company issued this SPD four years before implementing the challenged decrease in benefits, the SPD was more than sufficient to put plaintiffs on notice of the possibility of future amendment or termination of their benefits. *See id.*; *see also Wise*, 986 F.2d at 933, 936-37 (holding that an employer provided sufficient notice where it issued an SPD containing a modification clause for the first time in May 1985 and then made changes to plan benefits in October 1985).[4]

[4]Plaintiffs contend that the 1986 SPD was insufficient to provide proper notice because it was a description of an ERISA plan that was separate and different from the Maryland Cup plan to which they belonged. According to plaintiffs, the company established a new plan in October 1985 when it converted the Maryland Cup plan into a self-funded plan, and the 1986 SPD relating to that new plan cannot affect their rights under the old plan. We find this argument meritless. In 1985, the company merely changed the funding mechanism for the plan. It did not change any of the benefit terms, and it even notified retirees that there would be "no change" in their plan benefits. The post-1985 plan

In an effort to avoid the binding effect of the 1986 SPDs, plaintiffs now contend that they never received any SPD. In order to state a claim that a faulty plan description (including non-receipt of a proper SPD) prohibits a company from exercising its right to modify a plan, a plaintiff "must show some significant reliance upon, *or* possible prejudice flowing from," the lack of notice of an accurate description of the terms of the plan. *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993). Here, the district court gave the plaintiffs an opportunity to make that reliance/prejudice showing; in its opinion, the court stated that its decision to grant summary judgment to the company was subject to reconsideration upon any individual plaintiff's showing of detriment stemming from failure to receive the 1986 SPD, and gave the plaintiff class thirty days to make such a showing. No member of the plaintiff class, however, presented any evidence of reliance or prejudice or even attempted to verify that he did not receive the SPD. Because courts may not infer the existence of detrimental reliance or prejudice without some affirmative evidence to that effect, *see Anderson*, 836 F.2d at 1520, we hold that plaintiffs failed to carry their burden of proving that the 1986 SPD was insufficient to provide proper notice of the company's right to modify or terminate the plan.

IV.

We recognize the real hardship that changes in employee benefit plans can visit upon individuals who have worked many years for a company. The enactment of ERISA, however, required Congress to strike a difficult balance between employee rights and available employer resources. In passing ERISA, Congress determined that

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was clearly a *revised* plan, not a *new* plan, and the 1986 SPD thus provided adequate notice of the company's right to modify plaintiffs' plan benefits.

Moreover, the argument that the plan terminated in 1985 is one that is fraught with greater danger for the retirees in this case than an argument of plan continuation. A terminated plan might leave plaintiffs with no benefits because, as we have noted, their benefits have not vested and they have failed to establish any statutory violation of ERISA on the part of the company in this case.

requiring employers to provide vested employee welfare benefits "would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726; S. Rep. No. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4935. Congress accordingly rejected vesting requirements for welfare benefit plans and instead accorded employers the flexibility to make future modifications of such plans "as inflation, changes in medical practice and technology, and the costs of treatment dictate." *Owens*, 984 F.2d at 398; *see Moore*, 856 F.2d at 492 (noting that "unstable variables prevent accurate predictions of future needs and costs" involved in employee welfare benefit plans). In this case, an employer provided a generous medical benefit plan to its active and retired employees in reliance on this well-established, statutory right to make future modifications to the plan, and even expressed its understanding of this modification right in its plan documents and SPDs. Were we to hold that the company was nonetheless bound by the original terms of the plan and prohibited from making any amendments, we would strip employers of the protection that Congress intended to provide them and accordingly "discourage employers from offering any insurance at all." *Owens*, 984 F.2d at 398 n.5 (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)); *Sejman*, 889 F.2d at 1349 (stating that requiring the vesting of severance payments would "encourage such employers to forego severance payments altogether"); *Moore*, 856 F.2d at 492 (holding that vesting would "decrease protection for future employees and retirees"). Accordingly, we hold that the district court properly granted summary judgment to Sweetheart Cup in this case.

The judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 12, 1994

No. 94-1234
CA-90-268

ROBERT GABLE; HARVEY SPIES; JOHN FOLEY; EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated

Plaintiffs - Appellants

v.

SWEETHEART CUP COMPANY, INCORPORATED, a Delaware Corporation; FORT HOWARD CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION MEDICAL PLAN, and its plan administrators, John Does 1 through 10

Defendants - Appellees

and

SWEETHEART HOLDINGS, INCORPORATED, a Delaware Corporation; SWEETHEART CUP MEDICAL PLAN, and its plan administrators, John Does 11 through 20

Defendants

No. 94-1301
CA-90-268

ROBERT GABLE; HARVEY SPIES; JOHN FOLEY; EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated

Plaintiffs - Appellants

v.

SWEETHEART CUP COMPANY, INCORPORATED, a Delaware Corporation; FORT HOWARD CORPORATION, a Delaware Corporation; HOWARD CUP CORPORATION, A Delaware Corporation; HOWARD CUP CORPORATION MEDICAL PLAN, and its plan administrators, John Does 1 through 10

Defendants - Appellees

and

SWEETHEART HOLDINGS, INCORPORATED, a Delaware Corporation; SWEETHEART CUP MEDICAL PLAN, and its plan administrators, John Does 11 through 20

Defendants

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT GABLE, et al.	:	
	:	
v.	:	CIVIL ACTION NO. WN-90-268
	:	
SWEETHEART CUP COMPANY, INC., et al.	:	

ORDER

On January 14, 1994, this Court entered a Memorandum and Order affirming adopting the Report and Recommendation of United States Magistrate Judge Catherine C. Blake, granting defendants' motions or summary judgment, denying plaintiffs' motion for summary judgment, and granting individual class members thirty days within which to show reliance or prejudice in order to seek relief for a failure of notice. To date no such pleadings have been filed.

Accordingly, IT IS, this 15th day of February, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That judgment be and hereby is entered in favor of defendants and against plaintiffs;

2. That the Clerk of Court shall enter this case as CLOSED on this Court's docket; and

3. That the Clerk of Court shall mail copies of this Order to counsel in this case.

/s/
William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT GABLE, ET AL.	:	
	:	
v.	:	Civil Action No. WN-90-268
	:	
SWEETHEART CUP COMPANY, INC., ET AL.	:	

MEMORANDUM

Pending before the Court are Defendants' Objections (Paper No. 128)[1] and Plaintiffs' Objections (Paper No. 129) to the Report and Recommendation of Magistrate Judge Catherine C. Blake. Upon consideration of the Report and Recommendation (Paper No. 127) and the objections thereto, and after a *de novo* review of the entire matter, the Court determines that a hearing is not necessary (Local Rule 105.6) and that Magistrate Judge Blake's recommendations granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment should be affirmed and accepted with a modification as discussed below.

BACKGROUND

Plaintiffs and the class they represent, all retired prior to October 1, 1985 from their employment with Defendant Sweetheart Cup Company and its predecessors. In 1989, Sweetheart Cup Company made unilateral changes that reduced some benefits under the terms of a retirement health plan maintained by Defendants for Plaintiffs. In 1990, Plaintiffs brought suit under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") and federal

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[1]Although Defendants "concur in the result and support the Report and Recommendation of Magistrate Blake," Defendants object to certain factual findings so as to preserve certain issues for appeal. Defendants' Objections at 1.

common law. After extensive briefings and oral argument, Magistrate Judge Blake recommended that Defendants' motion for summary judgment be granted as to all claims and that Plaintiffs' motion for summary judgment be denied, with a reservation for a possible reconsideration.

DISCUSSION

A. ERISA Provisions

Under an ERISA plan, the employer must: "(1) set forth the plan in writing, (2) provide each plan participant with an [Summary Plan Description] 'within 90 days' after the participant becomes such a participant ... and (3) must state in the [Summary Plan Description] the participant's rights under the plan in 'accurate and comprehensive' language which can be understood by the average plan participant." *Pierce v. Security Trust Life Insurance Company*, 979 F.2d 23, 26-27 (4th Cir. 1992).

B. Report and Recommendation

In her Report and Recommendation ("R&R"), Magistrate Judge Blake found that the written ERISA plan at issue in this case "unambiguously reserves to the employer the right to amend or discontinue the health benefits provided to employees and therefore does not vest these benefits at retirement." *See* R&R at 13. As noted above, ERISA requires that an employer provide a Summary Plan Description ("SPD") to a plan participant. With respect to an SPD, Magistrate Judge Blake found that prior to October 1, 1985, Defendants "failed to provide plaintiffs an SPD that adequately notified them of the employer's right to amend the Plan at any time."[2] *Id.* at 21. She did find however, that in 1986, three years before the change in benefits that led to the present suit, "an SPD was distributed that did clearly explain this right." *Id.* at 22.

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[2]She found that "at no time prior to retirement [October 1, 1985] were [Plaintiffs] adequately notified of the employer's right to decrease or otherwise amend the major medical benefits." *Id. at 22.*

But Magistrate Judge Blake noted that "it is possible that not every member of the class received the 1986 SPD." *Id.* at n.17. And "[i]n order to obtain relief for a failure of notice, or for an SPD that inaccurately describes the benefits available under the Plan, the plaintiffs must show *both* reliance *and* prejudice." *Id.* at 22 (emphasis added).[3] Therefore, "if there are individual class members who can show prejudice *and* reliance", the R&R "should be subject to reconsideration." *Id.* at 23 (emphasis added). The Court highlights the conjunctive requirement in the R&R because the Fourth Circuit recently adopted a disjunctive construction. To secure relief, an ERISA claimant "must show some significant reliance upon, *or* possible prejudice flowing from, the faulty plan description." *Aiken v. Policy Management Systems Corporation*, No. 92-2257, 1993 WL 539818, at *3 (4th Cir. Dec. 30, 1993) (quoting *Govoni v. Bricklayers, Masons & Plasterers Int'l Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984)). Magistrate Judge Blake did not have the benefit of the *Aiken* opinion when she filed her R&R and subsequently informed the Court of the disjunctive standard adopted by the Fourth Circuit. Therefore, the Court will modify Magistrate Judge Blake's R&R to reflect the current law of this Circuit.

CONCLUSION

For the reasons addressed above, Magistrate Judge Blake's Report and Recommendation is Affirmed and Accepted with a modification. Accordingly, Plaintiffs' counsel shall have thirty days from the date of this Memorandum and Order to request a reconsideration from Magistrate Judge Blake on behalf of any individual class member who can show reliance *or* prejudice in order to obtain relief for a failure of notice. If no individual class

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[3]The Court shares Magistrate Judge Blake's doubts as to whether "such a showing could be made when the retirees are given notice that the employer has the right to alter benefits several years before any changes are made and where no vested right to benefits has been obtained." *See* R&R at 22-23.

member can show reliance or prejudice in thirty days, then this case shall be closed. A separate Order will issue.

/s/
William M. Nickerson
United States District Judge

Dated: January 14, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT GABLE, ET AL.	:	
	:	
V.	:	Civil Action NO. WN-90-268
SWEETHEART CUP	:	
COMPANY, INC., ET AL.	:	

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated therein, IT IS this 14th day of January, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That, pursuant to Fed. R. Civ. P. 72(b), the Report and Recommendation of Magistrate Judge Catherine C. Blake is hereby AFFIRMED and ACCEPTED as follows:

   a. The ERISA Plan at issue in this case UNAMBIGUOUSLY reserves to the employer the right to amend or discontinue the health benefits provided to employees and therefore DOES NOT VEST these benefits at retirement;

   b. Defendants, prior to October 1, 1985, FAILED to provide Plaintiffs a Summary Plan Description that adequately notified them of the employer's right to amend the Plan at any time;

   c. In 1986, Defendants DISTRIBUTED a Summary Plan Description which clearly explained the employer's right to amend the Plan at any time;

2. That Defendants' Objections filed are OVERRULED;

3. That Plaintiffs' Objections filed are OVERRULED;

4. That Defendants' Motion for Summary Judgment is GRANTED as to all claims and that Plaintiffs' Motion for Summary Judgment is DENIED;

5. That Magistrate Judge Blake's Report and Recommendation is subject to RECONSIDERATION for those

individual class members who can SHOW RELIANCE OR PREJUDICE in order to seek relief for a failure of notice;

6. That those individual class members have THIRTY DAYS from the date of this Order TO SHOW RELIANCE OR PREJUDICE in order to seek relief for a failure of notice;

7. That those individual class members who can show reliance or prejudice are hereby REFERRED to Magistrate Judge Blake for further proceedings;

8. That if no individual class member can show reliance or prejudice in thirty days, this case is CLOSED;

9. That the Clerk of the Court mail copies of this Memorandum and Order to all counsel of record.

/s/
William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT GABLE, ET AL.	)	
	)	
v.	)	Civil No. WN-90-268
	)	
SWEETHEART CUP COMPANY, INC.	)	

REPORT AND RECOMMENDATION

The plaintiffs in this case are members of the class of:

> All retired employees of Sweetheart Cup Company, and its predecessor, Fort Howard Cup Corporation, a wholly owned subsidiary of the Fort Howard Corporation, and its predecessors Maryland Cup Corp. and Maryland Cup Corporation, who retired before October 1, 1985, and who were, on June 1, 1989, participants in the Maryland Cup Corporation Medical Plan or its successor plans (the "Plan"). The class also includes all those individuals who are spouses of such retired employees and who, as spouses, are or will be participants in the Plan.

In their amended complaint, they bring suit under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") and federal common law. The defendants are Sweetheart Cup Co., Inc., Fort Howard Corp., and related entities.

The plaintiffs allege that under the medical benefits "Plan" in effect at the time they retired, they and their spouses were entitled to unreduced health care benefits for the remainder of their lives. Accordingly, they assert that certain unilateral changes made by Sweetheart Cup Co. on June 1, 1989, reducing some benefits, increasing annual deductibles, and requiring payment of a portion of the insurance premiums, were in violation of ERISA.

The plaintiffs assert, inter alia, breach of contract as a matter of federal common law, and rely on 29 U.S.C. § 1132(a)(1)(B) and (3), to enforce their claimed rights under ERISA.[1]

This case has been referred to me by District Judge William M. Nickerson pursuant to 28 U.S.C. § 636 and Local Rule 301. Now pending are the parties' cross-motions for summary judgment.[2]

The health benefits Plan at issue in this case is an "employee welfare benefit plan" within the meaning of ERISA. Benefits under such a plan are not vested under the ERISA statute, and ordinarily may be amended or eliminated by an employer. *See Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 28-29 (4th Cir. 1992); *see also Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). If an employer adopts a Plan that provides for

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[1]29 U.S.C. § 1132(a) provides in part that:

> A civil action may be brought —
> (1) by a participant or beneficiary —
>
> * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.
>
> (2) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

[2]The plaintiffs' motion for summary judgment on their request for permanent injunctive relief was filed October 1, 1992; the defendants' motion for summary judgment on all claims was filed October 15, 1992. Oral argument was heard January 6, 1993. Various letters addressing recent case law have been submitted by both sides periodically since that time. Settlement discussions were conducted but were unsuccessful.

vesting of health benefits at retirement, however, the employee may be bound under contractual principles to follow the terms of the Plan and provide the promised benefits. A court should look to the parties' intent to determine whether vesting has occurred. *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 95-6 (3d Cir. 1992); *International Resources v. New York Life Ins.*, 950 F.2d 294, 301 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2941 (1992).

ERISA requires that all welfare benefit plans be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), and that the written instrument describe the procedures by which the Plan can be amended. *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993). Oral modifications to the Plan are not permitted, and estoppel based on oral representations that would modify the written instrument does not provide a basis for recovery. *Pierce*, 979 F.2d at 29.[3] *See also Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1454 (4th Cir. 1992) (Wilkinson, J., concurring).

Where a Plan does not confer on the administrator discretionary authority with respect to eligibility for benefits or interpretation of Plan language, a denial of benefits should be reviewed by the court *de novo*. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Accordingly, the present Plan, which does not grant such discretionary authority, should be interpreted in accordance with the principles of contract law. *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992). The court's primary effort should be to determine the intent of the employer adopting the Plan, and its first resort should be to the language of the Plan. The court must decide whether the language of the Plan is unambiguous, or whether relevant portions of the Plan are susceptible to more than one reasonable interpretation, thus constituting an ambiguity. The Fourth Circuit has explained that:

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[3]The Fourth Circuit has not decided whether equitable estoppel may apply where the oral representations constitute interpretations, rather than modifications, of an ambiguous plan provision. *Coleman*, 969 F.2d at 59.

> Alleged ambiguities should be reconciled, if possible, by giving language its ordinary meaning and, if necessary, by admitting relevant, extrinsic evidence. If ambiguities remain, the Plan should be construed against the drafter....

Glocker, 974 F.2d at 544. In this case, as in *Glocker*, ambiguities should be construed against the employer. Further, the Plan must be construed as a whole, recognizing that "context colors the meaning of words." *Alexander*, 967 F.2d at 93; *see also Hansen v. Continental Ins. Co.*, 940 F.2d 971, 980 (5th Cir. 1991).

Both sides in this case point to the John Hancock Insurance Company Group Policy No. 49440-GTC as the written Plan document in effect prior to October 1, 1985. In the form provided to the court, this consists of approximately 225 pages, some dating from 1971 and others reflecting amendments as late as 1984. (*See* Defs.' Motion for Summary Judgment, Exh. A at 01765-01990).[4] Apparently, the group policy was entered into by Maryland Cup Corporation (and its predecessor entities) in the 1950's. A "restatement" of the policy was issued to Maryland Cup in 1971, three years before the enactment of ERISA. The policy includes life insurance, accidental death and dismemberment insurance, accident and sickness insurance, and various other forms of health care benefits. (*Id.* at 01767).

Section T, titled "General Provisions," covers approximately 100 pages. (*Id.* at 01882-01990). The portion principally relied on by the defendants under "Modification and Reinstatement of the Policy" is that:

> This Policy may be amended or discontinued at any time by written agreement between the company and the holder thereof without the consent of or notice to any employee or beneficiary or other person having a beneficial interest in said Policy;
>
> * * *

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[4]The Bates stamp numbers do not necessarily follow in order in this Exhibit.

> Termination of this Policy or amendments hereto shall not require the consent of or notice to any employee or beneficiary.

(*Id.* at 01997, Page T-62[5]). In response, the plaintiffs contend that this provision is merely part of the contract between Maryland Cup and John Hancock, dealing with those entities' rights and obligations to each other, and does not address any specific obligation of the employer to provide certain benefits to its employees, whether through John Hancock or any other insurance source. The plaintiffs point to Section L, which describes major medical benefits for employees, including "eligible retired employees." This section states that coverage terminates when an employee "ceases active work" except that:

> "Retired employee [sic] age 65 or over and their dependents, if any, shall be eligible for Major Medical Expense Insurance provided they are (1) office, salaried or sales retirees pensioned by Maryland Cup Corporation, (2) enrolled in Medicare parts A and B and for the local Blue Cross - Blue Shield Medicare supplements.

(*Id.*, at 01834, Page L-11).[6] Section W, describing major medical benefits for dependents, provides that if termination:

> "is due solely to the death of an insured retired employee ... coverage shall continue for the life of the dependent spouse, subject to the other terms and conditions of this provision...."

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[5]This page is dated October 1, 1975.

[6]This provision apparently was added in 1972 when coverage was extended to retirees. (Reply Memorandum in Support of Defs.' Motion for Summary Judgment, Exh. B).

(*Id.*, at 01869, Page W-13). The plaintiffs contend that these provisions are sufficient to vest lifetime benefits in retired employees and their spouses and dependents.

Sections L and W, however, also contain broad statements about discontinuance of insurance that appear applicable to retired as well as current employees. Section L provides that:

> The Major Medical Expense Insurance of an employee shall cease automatically on the earliest of the following dates:
>
> (a) the date of termination of employment of the employee as determined from the immediately succeeding paragraph
>
> * * *
>
> (e) the date of termination of this coverage under this Policy;
>
> (f) the date of termination of this Policy.

(*Id.* at 001834, Page L-11). Section W similarly provides that:

> The Major Medical Expense insurance of a dependent shall cease automatically on the earliest of the following dates:
>
> * * *
>
> (g) the date of termination of the Major Medical Expense Insurance for Dependents under this Policy.

(*Id.* at 001869, Page W-13). Nothing suggests that the date of termination of coverage may not precede the date a retiree or his spouse's coverage would otherwise expire (*e.g.*, upon death or remarriage).

In arguing that the Plan's provisions unambiguously require vesting, or at worst are ambiguous and thus permit consideration of extrinsic evidence, the plaintiffs rely heavily on the *Alexander*

case in the Third Circuit. In that case, no formal plan document existed, and the court therefore turned to three summary plan descriptions to determine the plan's provisions. At issue was a clause stating that:

> The Company expects to continue this plan indefinitely, but necessarily reserves the right to amend, modify, or discontinue the Plan in the future in conformity with applicable legislation.

967 F.2d at 92. The court found this clause ambiguous in the face of two reasonable interpretations: one, that the company reserved its right to modify the plan at any time, and two, that the company could only modify the plan to comply with legislation. *Id.*

The language at issue in this case, however, is closer to the language at issue in *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), a case expressly distinguished by the Third Circuit in *Alexander*. In *Musto*, where the plan document was an insurance policy, as it is here, the policy provided:

> This Policy, or any insurance coverage hereunder, may be amended or discontinued at any time by an announcement duly published by the Company. The Company reserves the right to determine new premium contributions from time to time and at any time. Termination of this Policy, or any insurance coverage hereunder, or any amendments hereto shall not require the consent of any Employee or beneficiary, nor shall such action require individual notice to any such person. Only the President, a Vice-President, the Secretary or an Assistant Secretary has power on behalf of the Company to make or modify this contract of insurance.

Alexander, 967 F.2d at 94, *quoting Musto*, 861 F.2d at 901-02. The Sixth Circuit, and by implication the Third, found this language, particularly the phrase "at any time," sufficient to reserve unambiguously the company's right to amend the Plan. 967 F.2d at 94-95; 861 F.2d at 901-02. *See also Coleman*, 969

F.2d at 57, (unambiguous provision of insurance policy permitted automatic termination of beneficiary's coverage when company premiums were not paid).

The parties also have examined cases dealing with ERISA benefits in the context of collective bargaining agreements. In determining whether welfare benefits for retirees continue beyond the expiration of a collective bargaining agreement, the court considers not only ordinary principles of contract interpretation but also the federal common law of labor policy. *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 62 (4th Cir. 1989). Accordingly, in addition to looking at the express language of a collective bargaining agreement, a court may consider the "practice, usage and custom pertaining to all such agreements." *Id.* at 62, *quoting Transportation & Communication Employees Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 161 (1966), *reh'g denied*, 87 S. Ct. 737 (1967).[7]

The plaintiffs point to the Seventh Circuit opinion in *Bidlack v. Wheelabrator Corp.*, 933 F.2d 603 (7th Cir.) (*en banc*), *cert. denied*, 114 S. Ct. 291 (1993), finding a collective bargaining agreement ambiguous on the issue of vesting where the company promised to provide health insurance benefits for retirees until they died and for surviving spouses thereafter. *Bidlack* found this provision ambiguous in part because the agreement did not say that coverage would cease "when [the retirees] die or the collective bargaining agreement expires, whichever occurs first." *Id.* at 608. In this case, the same policy section that provides coverage for retirees states that benefits will cease "automatically on the earliest of the following dates" and then lists "termination of this Policy" or "termination of this coverage under the Policy" as possible dates, which may precede the death of a retiree or dependent spouse. That language, combined with the general reservation of rights at T-62, can not be read as a promise of vested benefits.

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[7]This may provide a court somewhat more flexibility when interpreting a collective bargaining agreement than is permitted in the context of an ERISA plan.

For that reason, among others, the *Bidlack* case must be distinguished from the present case.[8]

The plaintiffs in this case strongly urge resort to extrinsic evidence to interpret the Plan's provisions. Various former employees and officers of Maryland Cup Corporation, most but not all of whom are members of the plaintiff class, testified to a "philosophy" and an "attitude" at Maryland Cup, from the earliest operations of what was largely a family-run company, that employee benefits were to be improved but never "back tracked from." (*See generally,* deposition excerpts at 4-14 of Plfs.' Memorandum in Support of Motion for Summary Judgment). Henry Shapiro apparently had the clearest recollection of a commitment that whatever was promised to the employees was "for life for them and their spouses." (*Id.* at 12). Plaintiffs John Foley and Eugene Foreman, as well as Paul Kram, who is not a member of the plaintiff class, recalled communicating this company policy to other employees on numerous occasions. (*Id.* at 14-16).

The defendants, on the other hand, contend that if extrinsic evidence is to be considered, the individual certificates of insurance apparently distributed to many members of the plaintiff

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[8]District court opinions addressing the issue of vesting of retirees' benefits under collective bargaining agreements have reached varying results, generally depending on the express language of the agreement at issue. *See, e.g., United Steelworkers v. Newman-Crosby Steel*, 822 F.Supp. 862 (D.R.I. 1993) (where nothing in collective bargaining agreements addressed expiration of benefits for retirees, termination provisions in SPD and policy booklets did not prevent vesting); *John Morrell & Co. v. United Food & Commercial Workers International*, 825 F.Supp. 1440 (D.S.D. 1993) (where collective bargaining agreements provided that benefits remained in effect for the duration of the collective bargaining agreements, retiree benefits did not continue beyond the expiration of that agreement); *Joyce v. Curtiss-Wright Corp.*, 810 F.Supp. 67 (W.D.N.Y. 1992) (collective bargaining agreement was rendered ambiguous by contradiction between general durational clause and failure to include expiration of collective bargaining agreement as exclusionary provision in the insurance contract).

class evidence a clear reservation of rights by the company to alter or to amend benefits.[9]

Governing principles of this Circuit, however, preclude reliance on extrinsic evidence by either side unless necessary to resolve an ambiguity in the Plan language. *See Audio Fidelity v. Pension Benefit Guaranty Corp.*, 624 F.2d 513, 517-18 (4th Cir. 1980). The plaintiffs contend that "the central issue in this dispute is whether the Maryland Cup Corporation major medical benefits plan for retirees unambiguously retained in the employer a unilateral right to alter, amend or terminate retirees' major medical benefits without comment from or notice to the retirees." (Plfs.' Reply to Defs.' Response to Plfs.' Motion for Summary Judgment at 1). A related, more fundamental question must also be answered: does the Plan unambiguously demonstrate the employer's intent to vest these benefits upon an employee's retirement? There is no presumption in this Circuit in favor of vesting welfare benefits, even for retirees; indeed the Fourth Circuit recently reaffirmed its position that a company's right not to vest welfare benefits "is in accord with the manifest purposes and language of ERISA itself." *Pierce*, 979 F.2d at 28. In this case, the Plan's language notifying employees that coverage ceases when the policy terminates, and reserving the employer's right to terminate the policy at any time, unambiguously overcomes any apparent promise of vesting that may be drawn from the description of benefits currently available to retired employees and their spouses. Whatever the expectations or hopes of the company's founders may have been, the Plan nevertheless reserves to the employer the right to amend or terminate health benefits coverage at any time.

The plaintiffs also argue, as noted above, that the language in the policy permitting amendments as between the employer and the insurance company can not be used to deny the employer's

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[9]The defendants also rely on evidence that health benefits for retirees were amended on numerous occasions during the years prior to 1985. Those amendments, however, were almost entirely favorable to retirees, and are not sufficient in themselves to prove that the amendment clause permitted the employer to amend the Plan in a way that decreased or discontinued benefits. *Alexander*, 967 F.2d at 93.

obligation to provide promised coverage, through some other insurance policy if necessary, to its employees. The difficulty with this argument is that no Plan other than that contained in the insurance policy has been identified; there is no document separate from the policy, that constitutes a Plan and makes a written promise of lifetime coverage for retired employees and their spouses.[10] In the *Newman-Crosby* case cited by plaintiffs, the court was able to rely on a particular paragraph of the collective bargaining agreement in which the company promised to pay the cost of providing life insurance for each retired employee, without reference to any particular life insurance policy. 822 F.Supp. at 865. Under those circumstances, insurance company brochures that referred to termination of coverage when the policy terminated were found not to alter the company's promise in the CBA to "pay the cost of providing life insurance" for retired employees. *Id.* No such independent Plan promise has been identified here.[11]

Considering Fourth Circuit case law, as well as *Musto* and other cases cited above, I must recommend finding that the Plan unambiguously reserves to the employer the right to amend or discontinue the health benefits provided to employees and therefore does not vest these benefits at retirement. Accordingly, extrinsic evidence should not be considered on the evidence of intent, since

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[10]The issue of SPD's and other informational documents will be discussed later.

[11]While the plaintiffs argue that oral representations by the employer should be considered in interpreting what they contend is an ambiguous Plan, I do not understand them to argue that the oral representations independently constitute an enforceable ERISA obligation, or that these representations are sufficient to modify an unambiguous Plan by way of equitable estoppel. Such an argument has been rejected by the Fourth and other Circuits in holding that equitable estoppel principles may not be relied on to permit oral modification of an unambiguous written plan. *Coleman*, 969 F.2d at 58-60; *Pierce*, 979 F.2d at 29; *see also Musto*, 861 F.2d at 910; *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

no ambiguity has been shown.[12] *See Audio Fidelity*, 624 F.2d at 517-18.

Finding the plan unambiguous, however, does not end examination of the plaintiffs' claims. Few, if any, of the plaintiffs ever saw or reviewed the entire insurance policy that constitutes the Plan. (*See, e.g.*, Plfs.' Reply to Defs.' Response to Plfs.' Motion for Summary Judgement, Exh. A). Under ERISA, employers are required to furnish SPD's which are "written in a manner calculated to be understood by the average plan participant, and ... [are] sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1); *Fuller v. FMC Corp.*, 4 F.3d 255, 260 (4th Cir. 1993). The SPD must describe "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). This section requires employers to disclose how benefits may be unknowingly or involuntarily lost. *Dist. 29, United Mine Workers v. New River Co.*, 842 F.2d 734, 737 (4th Cir. 1988).

The SPD is the "'statutorily established' source of information" on which a participant seeking information about his or her plan benefits is entitled to rely. *Pierce*, 979 F.2d at 27. Accordingly, if there is "a conflict between the complexities of the plan's language and the simple language of the SPD, the latter [will] control." *Id.* A disclaimer in the SPD referring a participant to the Plan for a complete statement of benefits may not be used to nullify a representation in the SPD that is more favorable than the actual Plan language. *Id.*; *see also Glocker*, 974 F.2d at 543; *Hansen*, 940 F.2d at 981-82.

The plaintiffs contend that at no point prior to October 1, 1985, did the defendants provide to beneficiaries an SPD that reserved to the employer a unilateral right to amend or terminate health benefits for retirees. They further argue that the plan descriptions and other documents distributed to retirees before October 1, 1985, evidence an intent to vest health benefits upon retirement. The defendants deny that any intent to vest is shown by the pre-1985 documents. They contend that the individual

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[12]If extrinsic evidence were to be considered, I would find that disputes of material fact preclude summary judgment for either side.

certificates of insurance issued to most participants satisfy the requirements of an SPD and preclude vesting, and that any failure to notify participants prior to 1985 of the employer's reservation of rights was cured by the 1986 SPD's which did provide such notice.

The evidence shows that individual certificates of insurance were issued by the John Hancock Company to be provided to employees as required by the terms of the master policy. Those certificates, in use from 1958 to 1985, stated on the first page:

> The Policy(ies) under which this certificate is issued may at any time be amended or discontinued by agreement between the Insurance Company and the Policyholder without the consent of or giving of notice to the Insured Person.

(Defs.' Motion for Summary Judgment, Exhs. B and C). These certificates also addressed discontinuance of insurance, stating that:

> All coverages shall cease on the earliest of the following dates:
>
> * * *
>
> (4) the date of termination of the Policy(ies)....
>
> An individual coverage of the Insured Person shall cease on the earliest of the following dates[:] ... the date of termination of such coverage under the Policy.

(*Id.*, Exh. B and C at T-1; *see also* T-2 as to dependents).

G. George Fink, who handled and maintained insurance documents for the company beginning in the early 1960-s, including the Hancock master policy, (*Id.*, Exh. D at 7-9), believed that individual certificates were issued to each new employee and that policy amendments were communicated by a written "insert" to the individual certificate distributed to all employees when the amendment was made. His recollection of

these procedures, however, was limited. (*Id.*, Exh. D generally).[13] Other than the certificates, he could not identify any SPD or other document that provided employees a summary of their benefit package (*Id.* at 71-72).

Bernard J. Allen, speaking as a corporate designee for Fort Howard, identified the certificate of insurance as an SPD and could not identify any other document prior to 1985 relied on by Fort Howard as reserving the employer's right to amend retirees' benefits. (Plfs.' Memorandum of Law in Support of Motion for Summary Judgment, Allen Depos. at 10-11, 18, 21).

The plaintiffs contend that these certificates do not meet the requirements of an SPD established by 29 U.S.C. § 1022(b). The defendants do not deny that some of the statutorily required information is lacking, but argue that the certificate "substantially" satisfies the statute.

The certificates of insurance were directed to all employees covered by the Hancock policy. Discovery also has produced various documents directed specifically to retirees. A personal statement of benefits, for example, dated March 1983, directed to plaintiff Robert R. Gable, itemized his anticipated pension payments and also stated "you and your dependents are also eligible for certain additional fringe benefits including ... BASIC HOSPITAL AND MEDICAL/SURGICAL INSURANCE AND MAJOR MEDICAL INSURANCE." (Plfs.' Memorandum of Law in Support of Motion for Summary Judgment, Exh. 5 at 00320.) This section also states that:

> Every effort has been made to report all insurance information accurately. However, the availability of benefits and their amounts are subject to the plans in effect.

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[13]The defendants also have provided affidavits from other company officials supporting Mr. Fink's general recollection. (Reply Memorandum in Support of Defs.' Motion for Summary Judgment., Exhs. C, D, E). The plaintiffs have offered no substantial contradiction and agree that the certificates "apparently were distributed to most, if not all, employees at some time during their employment." (Letter dated October 22, 1993, from John T. Ward to the court).

(*Id.*). An undated description of "Major Medical Insurance" notes that: "Retirees under our pension program and their eligible dependents continue their $750,000 lifetime maximum after they retire." (*Id.*, Ex. 6). Another summary of "Retirement Insurance" dated February 1980 states, under "Major Medical Insurance," that:

> When you retire, you will be able to continue your Major Medical Insurance (at Company expense). In order to be eligible for Major Medical Insurance when you reach age 65, you must obtain and retain Medicare (A and B) coverage. After retirement, Major Medical Insurance is limited to a maximum of $250,000 for your lifetime and is subject to your deductible amount (normally $50 per year) before presentation of claims. The $250,000 lifetime maximum is not subject to reinstatement.
>
> Major Medical Insurance is also available to your dependent spouse if, before you retire, she (or he) is covered under the Maryland Cup Major Medical Plan.
>
> For additional information about retirement insurance for yourself and your dependent spouse, contact your personnel department or your manager.

(*Id.*, Exh. 7). No possibility of termination is mentioned in these descriptions. (*See also*, Defs.' Motion for Summary Judgment, various documents collectively labeled Exh. H).

As of October 1, 1985, the Plan was converted to an employer-funded Plan, administered by John Hancock.[14] Coverage under the Hancock policy was cancelled as indicated by

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[14]The new Plan stated: "This Plan can be amended, modified or terminated at any time by action of the Employer as set forth in the Plan document of which the Plan is a part." (Defs.' Motion for Summary Judgment, Exh. F at 508). The plaintiffs do not claim any vested benefits under this new Plan.

individual certificates of amendment dated April 14, 1986. (Plfs.' Response to the Six Defense Motions, Exh. B). By letter dated September 1985, however, retirees had been advised that the Hancock company would now administer all programs but "you will continue the same level of coverage indicated in your retirement package with *no change* in your program." (*Id.*, Exh. C)(emphasis in original).

In May 1986 and later, SPD's were issued regarding retiree benefits that clearly reserved the right of the employer to terminate or modify the health coverage at any time. (*Id.*, Maietta Depos. at 34-38; Defs.' Motion for Summary Judgment, Exh. G at 00127, 5027, 3398; Reply Memorandum in Support of Defs.' Motion for Summary Judgment, Exh. L). The May 1986 Maryland Cup summary contains a particularly clear statement titled "Future Coverage under the Plan:"

> The continuation of medical coverage, and at what benefit level and/or cost, will depend upon the actual Plan provisions and company policy in effect at any specific time in the future. While it is not the intent of Maryland Cup to discontinue this coverage, Maryland Cup Corporation reserves the right to modify, change, or terminate the medical coverage for retirees at any time in the future, just as it does for active employees. Should your eligibility for coverage ever be terminated, you would be eligible to exercise the conversion privileges like any other person no longer eligible to participate in this group plan.

(Defs.' Motion for Summary Judgment, Exh. G at 00127). The plaintiffs do not concede that all members of the class received the 1986 SPD but do not offer substantial evidence to the contrary. (*See* Plfs.' Response to the Six Defense Motions, Exh. A). Coverage continued, in any event, without significant changes, until June 1989.

As noted, the members of the class all retired before the October 1, 1985 conversion of the Plan to a self-funded program and before the distribution of the 1986 SPD clearly alerting retirees who received it to the possibility of future change. Shortly before retiring, most of the members of the class received a document

entitled "Schedule II," consisting of several pages describing the health care and other benefits they could expect to receive as retirees. Sample Schedule II's as revised from 1973 through 1984 describe "lifetime" major medical coverage for the retiree and his or her eligible spouse with no reservation of any right to modify or terminate coverage.[15] They are signed by the employee and a company representative. (*See* Defs.' Motion for Summary Judgment, Exh. I).[16]

At some point in 1985, language was added to the Schedule II's stating either

> The right is reserved in the Plan(s) for the Company to terminate, suspend, withdraw, amend, or modify the Plan(s) in whole or in part at any time. The Plan document will control.

(*Id.*, Exh. J); or

> Whether or not Medical Coverage will be continued for you as a retiree, and at what level of benefit will depend upon the particular plan provision and Company Policy in effect at any specific time in the future, although it is not intended that your eligibility for continued medical coverage would cease. Should that ever be the case, you would be eligible to convert to an individual policy, just as anyone else who would not be eligible to participate in the group plan.

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[15]The plaintiffs do not contend that these Schedule II's constitute SPD's (Plfs.' Response to the Six Defense Motions, at 30).

[16]In addition, class members have cited oral representations made to them by employer representatives indicating that their retirement benefits were fixed for life. Several witnesses testified that such assurances were given frequently by high level company officials. (*See* Plfs.' Memorandum of Law in Support of Motion for Summary Judgment, Foreman Depos. at 70-71, 75; Kram Depos. at 61-63; Henry Shapiro Depos. at 64).

Id. Some of the class members received these versions of the Schedule II.

Considering all the documentary and other evidence presented in these motions, I would agree with the plaintiffs' contention that prior to October 1, 1985, the defendants failed to provide plaintiffs an SPD that adequately notified them of the employer's right to amend the Plan at any time. The certificate of insurance can not serve this purpose. It does not comply with many of the "technical" requirements of 29 U.S.C. § 1022(b). *See Hicks v. Fleming Companies*, 961 F.2d 537, 541-43 (5th Cir. 1992). More significantly, it does not satisfy the substantive requirement of being "written in a manner calculated to be understood by the average plan participant." Much of it is in language similar or identical to the master policy. As stated by the Fifth Circuit in *Hansen*:

> The certificate of insurance, which sets out the full terms of the policy, is no part of the summary plan description. Continental confounds the *policy* with a *summary* of the policy, collapsing two distinct documents into one. By definition, a summary description of the policy does not reproduce each and every term, word for word, of the policy. Indeed, the very purpose of having a summary description of the policy is to enable the average participant in the plan to understand readily the general features of the policy, precisely so that the average participant need *not* become expert in each and every one of the requirements, provisos, conditions, and qualifications of the policy and its legal terminology.

940 F.2d at 981. Further, unlike the master policy, which is the only written Plan identified, the certificate of insurance was but one of several benefit descriptions distributed to the members of the class. The documents on which the employees would be more likely to rely for an understandable explanation of their retirement benefits are the Schedule II's and the various brochures discussed above. Thus, without adopting the position that a certificate of insurance can never be an SPD, I would find that the employer's burden of furnishing an SPD that clearly notified retirees of the

employer's right to modify their health benefits can not be met by relying on the Hancock certificates in this case.

Assuming the above conclusions are correct, the plaintiffs in this case appear to fall squarely within the principles established by the Fourth Circuit in *Pierce* and *Fuller*. At no time prior to retirement were they adequately notified of the employer's right to decrease or otherwise amend the major medical benefits. In 1986, however, an SPD was distributed that did clearly explain this right.[17] The change in benefits that is complained of did not occur until 1989.

In order to obtain relief for a failure of notice, or for an SPD that inaccurately describes the benefits available under the Plan, the plaintiffs must show both reliance and prejudice. *Pierce*, 979 F.2d at 30; *Fuller*, 4 F.3d at 261-62. Under *Pierce*, it is difficult to see how such a showing could be made when the retirees are given notice that the employer has the right to alter benefits several years before any changes are made and where no vested rights to benefits has been obtained. *Pierce*, 979 F.2d at 30. The Fourth Circuit has specifically rejected the argument that reliance and prejudice may be presumed, even where "'the company wholly fails to inform its employees that their benefits are subject to change at the employer's whim.'" *Id.*

Accordingly, for the reasons stated above, it must be recommended that the plaintiffs' motion for summary judgment be Denied, and the defendants' motion for summary judgment as to all claims be Granted.[18] This recommendation should be subject to reconsideration, however, if there are individual class members who can show prejudice and reliance. Plaintiffs' counsel should

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[17]It is possible that not every member of the class received the 1986 SPD. There is no evidence of intentional concealment by the defendants, however, and any relief for an individual who did not receive notice would still depend on a showing of reliance and prejudice. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 936 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993); *see also Godwin v. Sun Life Assurance Co.*, 980 F.2d 323, 328 (5th Cir. 1992).

[18]If this recommendation is affirmed, it would not appear necessary to address the other pending defense motions.

be given an opportunity to decide whether to request such reconsideration on behalf of individual clients.

Nov. 29, 1993
Date

/s/
Catherine C. Blake
United States Magistrate Judge